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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED, MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY d/b/a HOSPITAL FOR SPECIAL SURGERY

Plaintiff,

v.

CENTERS FOR ORTHOPEDIC MOBILITY, LLC; CENTERS FOR ORTHOPEDIC MOBILITY OF FLORIDA, LLC; CENTERS FOR ORTHOPEDIC MOBILITY OF PALM BEACH, LLC,

Defendants.

Civil Action No. __________
ECF Case

COMPLAINT

Plaintiff NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED, MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY ("HSS"), a New York not-for-profit corporation, alleges as follows for its complaint against Defendants CENTERS FOR ORTHOPEDIC MOBILITY, LLC, CENTERS FOR ORTHOPEDIC MOBILITY OF FLORIDA, LLC and CENTERS FOR ORTHOPEDIC MOBILITY OF PALM BEACH, LLC (collectively "Defendants" or "COM"):

NATURE OF THE ACTION

1. This is an action for preliminary and permanent injunctive relief, and to recover for Defendants' false advertising, false designation of origin, and unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125a, and for related violations of state law.

2. Hospital for Special Surgery (HSS) is the world's largest academic medical center focused on musculoskeletal health. HSS is nationally ranked No. 1 in orthopedics and No. 2 in rheumatology by U.S. News & World Report (2016-2017), and is the first hospital in New York State to receive Magnet Recognition for Excellence in Nursing Service from the American Nurses Credentialing Center four consecutive times. HSS has been top-ranked for both orthopedics and rheumatology for 25 consecutive years, and has one of the lowest infection rates in the country. HSS is an affiliate of Weill Cornell Medical College, and as such, all HSS medical staff are faculty of Weill Cornell. The Hospital's research division is internationally recognized as a leader in the investigation of musculoskeletal and autoimmune diseases.

3. Defendants are seeking to enter the orthopedic care space with 40 non-surgical centers to be opened across the county over the next five to seven years. Defendants are well aware of HSS's reputation and standing. Since at least January 2017, Defendants have, on information and belief, actively solicited potential investors by trading on HSS's well-known name and sterling reputation, falsely and misleadingly creating the impression that Defendants are associated with HSS. Defendants' advertising materials sent to potential investors, attached as Exhibits 1 and 2, create the additional false impression that the COM standards of care somehow use or are built from HSS practices.

4. Defendants' false and misleading statements to potential investors dilutes, tarnishes, and harms the reputation of HSS, and creates a likelihood of confusion as to an

association or affiliation between Defendants and HSS, in violation of the Lanham Act and New York law.

5. Defendants' activities will continue to injure HSS unless enjoined by this Court. HSS seeks preliminary and permanent injunctive relief, compensatory and punitive damages, and HSS's reasonable attorneys' fees and costs.

PARTIES

6. HSS is a New York not-for-profit corporation with its principal place of business located at 535 East 70th Street, New York, NY 10021.

7. Defendant Centers for Orthopedic Mobility, LLC is a limited liability company organized and existing under the laws of the State of Delaware. Defendants Centers for Orthopedic Mobility of Florida, LLC and Centers for Orthopedic Mobility of Palm Beach, LLC are Florida limited liability companies organized and existing under the laws of the State of Florida. Upon information and belief, Defendants' principal address is within this judicial district at 551 Madison Ave., New York, NY 10022.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the federal claims arising under the Trademark Act, 15 U.S.C. § 1051 et seq., pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. This Court has supplemental jurisdiction over HSS's related state statutory and common law claims pursuant to 28 U.S.C. §§ 1338 and 1367.

9. This Court has personal jurisdiction over Defendants and venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because, upon information and belief, Defendants are residents in this district and solicit business and investors in this district. Further, Defendants' actions that give rise to the claims herein have occurred in New York State and in

this judicial district, making jurisdiction proper under N.Y.C.P.L.R. § 302. Additionally, HSS is suffering irreparable harm in this district.

FACTS

10. Founded in 1863, HSS has been top-ranked for both orthopedics and rheumatology for 25 consecutive years. Its stature is recognized year after year in third-party publications such as U.S. News and World Report. HSS is the recipient of numerous awards and No. 1 rankings, recognizing HSS for its excellence in care and patient outcomes, including from the prestigious American Nurses Credentialing Center Magnet Recognition Program, Healthgrades, CareChex, Press Ganey, Castle Connolly, and New York Magazine. HSS has become synonymous with excellence. The names and service marks HOSPITAL FOR SPECIAL SURGERY and HSS are well known to both the American public and in the health care industry, and are famous within the meaning of 15 U.S.C. § 1125(c).

11. Defendants are well aware of HSS's stature, reputation, and good will, and are seeking to unfairly capitalize on HSS's good will by creating the impression that HSS is somehow affiliated with Defendants, when it is not.

12. On information and belief, Defendants are seeking investors to garner funding to open 40 orthopedic care centers around the country.

13. In seeking investors, Defendants seek to leverage HSS's reputation by creating the misleading impression of affiliation with HSS in materials sent to prospective investors, including, a slide deck (Ex. 1) and a one-page teaser (Ex. 2).

Defendants' Slide Deck for Potential Investors

14. Defendants, on information and belief, sent and continue to send a slide deck dated January 27, 2017 to prospective investors.

15. The deck states prominently, in bold, that "All founding physicians are at Hospital for Special Surgery." Ex. 1 at 2. The slide deck also refers to "COM's team of leading HSS MDs/surgeons." *Id.* These statements suggest to potential investors that HSS is somehow involved or affiliated with Defendants' business. It is not.

16. Defendants flaunt HSS's recognition and rankings in a blatant attempt to trade on HSS's hard-won stature, though HSS has no connection to or involvement with Defendants. Defendants' slide deck notes, again in bold, "HSS, #1 in the world," pasting a copy of the top five orthopedics hospitals as ranked by U.S. News and World Report. Ex. 1 at 2.

17. Defendants also seek to create the impression that Defendants' methods, procedures, and protocols were developed with the involvement, cooperation, and approval of HSS. The slide deck refers to "Protocols developed by COM's team of leading HSS MDs/surgeons" and claims it is "[d]riven by evidence-based medicine – beyond even HSS practices." These statements create the misleading (and false) impression that HSS's practices and protocols form the basis of Defendants' standards. Ex. 1 at 2-3.

18. Defendants further seek to improperly prop their reputation on HSS's shoulders by creating the appearance that Defendants' medical team holds more prestigious titles at HSS than in reality. Slide 7 of Defendants' slide deck contains the following list:

Board members and shareholders

- Top Board Certified orthopedic specialists currently practicing at HSS in Manhattan
  - **Charles Goodwin, MD** - Founder, Chief of Spine Surgery, Chairman of the Medical Advisory Board
  - **Struan Coleman, MD, PhD** - Founder, Chief of Sports Medicine Surgery
  - **Dan Richman, MD** - Chief of Anesthesiology/Pain Management
  - **Brian Halpern, MD** - Chief of Non-Surgical Sports Medicine
  - **Doug Seckendorf, DC, CCSP** - Chief of Non-Surgical Spine Care
  - **Rock Positano, DPM, MSc, MPH** - Chief of Non-Surgical Foot & Ankle Care

By listing the board member titles under the parent bullet stating they are "currently practicing at HSS in Manhattan," the list on Slide 7 creates the false impression that the titles there are held at HSS. For example, Dr. Charles Goodwin is not a Founder of HSS, Chief of Spine Surgery at HSS, or Chairman of a medical advisory board at HSS. Dr. Coleman is not a Founder of HSS or Chief of Sports Medicine Surgery at HSS.

19. The slide deck also indicates Defendants may intend to trade not only on HSS's reputation but also its registered trademarks. Slide 18 of the slide deck depicts a concept COM office with a prominent 3-letter logo "COM" in white and all-caps against a blue background, characteristics shared by HSS's registered trademark. The two images are pasted below:

Main Entrance (Projection)
COM
COM
COM

Defendants' One-Page Teaser for Potential Investors

20. In addition to the slide deck, Defendants, on information and belief, sent and continue to send, a one-page teaser to prospective investors that makes similar misrepresentations attempting to trade on HSS's reputation and creating the misleading impression of HSS affiliation with Defendants. Ex. 2.

21. Like the slide deck, the teaser creates the false impression that Defendants' business is built off of HSS procedures, protocols, and standards. It states, "COM intends to build on advances in musculoskeletal care developed in the most innovative centers of excellence worldwide, and in particular, at the Hospital for Special Surgery (HSS) in New York City." Ex. 2. The teaser continues, "COM's standard of care combines the advanced knowledge and techniques distilled over many years by its founding physicians at HSS and will be applied systematically at all COM locations." These statements falsely suggest that HSS is involved in and/or has approved of Defendants' practices.

22. The teaser goes on to detail HSS's long history, recognition, and stature, seeking to entice investors to Defendants through HSS's reputation. The teaser includes HSS's No. 1 ranking in U.S. News and World Report and more, describing to potential investors that "HSS is the leader in orthopedic surgery, diagnostics and non-surgical treatments, in large part because HSS has been singularly focused on orthopedics for over 150 years. HSS has over 220,000 patient visits and performs over 29,000 surgeries annually." HSS has no affiliation or connection to Defendants, and Defendants' attempt to ride on HSS's coattails creates confusion as to an affiliation between HSS and Defendants. Further harm is added since the teaser vastly understates the number of patient visits and surgeries performed at HSS.

23. HSS first became aware of Defendants' improper suggestions of affiliation with HSS through the teaser. HSS contacted Defendants and reached agreement on February 8th, 2017 that Defendants would "take the HSS name and marks out of our documents altogether." Notwithstanding that agreement, on information and belief, materials referencing HSS and Hospital for Special Surgery continue to be disseminated. Also, while a representative for Defendants agreed to discontinue the one-page teaser, he never mentioned to counsel for HSS that Defendants were also distributing the slide deck, which HSS only learned about in the past several days.

24. On information and belief, Defendants are deliberately seeking to appropriate HSS's existing good will and recognition.

25. By creating an association in the minds of potential and future investors that impairs the distinctiveness of the HSS name and creates a false association between Defendants and HSS, Defendants' references to HSS and its prestige dilutes and tarnishes HSS's substantial good will and reputation for excellence.

26. HSS is not affiliated with Defendants.

27. As a result of Defendants' unauthorized actions, HSS is suffering irreparable injury for which there is no adequate remedy at law, and absent injunctive relief, will continue to suffer irreparable injury for which there is no adequate remedy at law.

28. On information and belief, Defendants have derived direct and indirect benefits from its unlawful advertising. Defendants' actions have caused and will continue to cause HSS to suffer damages, including but not limited to, damaged reputation and good will.

29. On information and belief, Defendants' actions have been willful and in disregard of HSS's rights.

30. On information and belief, Defendants have disseminated false and misleading statements described herein to potential investors through interstate commerce, and in a manner affecting interstate commerce.

31. Defendants' activities complained of herein have damaged HSS in an amount that is not yet determined.

COUNT I

False Advertising and False Designation of Origin Under Lanham Act § 43(a)

32. HSS repeats and incorporates by reference the allegations in the foregoing paragraphs.

33. Defendants' false and misleading statements constitute false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

34. Defendants' false and misleading statements concerning affiliation with HSS are material, constitute false designation of origin and false descriptions of fact, have and are likely to continue to influence investors' decisions, and are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, origin, or approval of Defendants' services with HSS.

35. Defendants' false and misleading advertising has caused and continues to cause irreparable injury to HSS's business, goodwill and reputation, and HSS has no adequate remedy at law. Upon information and belief, Defendants' actions will continue if not enjoined.

36. Defendants knew, or by exercise of reasonable care should have known, that the above-described representations and advertising claims are false and/or misleading, and are likely to deceive. Accordingly, Defendants' actions were willful.

COUNT II

Deceptive Acts and Practices Under N.Y. Gen. Bus. Law § 349

37. HSS repeats and incorporates by reference the allegations in the foregoing paragraphs.

38. Defendants' false and deceptive advertising contains materially misleading statements of fact concerning affiliation, connection, origin, or approval of Defendants' services by or with HSS.

39. Defendants' false and misleading statements of fact may deceive prospective investors into believing Defendants' business is affiliated with HSS and carries HSS's imprimatur, approval, and prestige.

40. Defendants' false and misleading statements described above trade on and dilute HSS's good will, and are likely to injure HSS's business reputation.

41. On information and belief, Defendants' actions demonstrate a willful intent to trade on and dilute the good will associated with HSS's reputation.

42. As a direct and proximate result of Defendants' wrongful acts, HSS has been injured and incurred damages in an amount to be proven at trial.

43. Accordingly, the foregoing actions of Defendants constitute a knowing and willful violation of N.Y. Gen. Bus. Law § 349.

44. HSS is entitled to injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, HSS prays that Judgment be entered against Defendants as follows:

1. That Defendants, its partners, agents, employees, and all persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from:

a. Further disseminating the false and deceptive advertising described herein in any form or medium;

b. Publishing or publicly disseminating any statement, either directly or indirectly, concerning any affiliation with or approval by HSS in any way so as to constitute deceptive, untrue, or misleading advertising;

c. Tarnishing, harming the reputation of, blurring, impairing the distinctiveness of, or otherwise diluting HSS's reputation and good will through the use and dissemination of materials discussed above or any other advertisements;

d. Engaging in any other activity constituting deceptive trade practices or unfair competition with HSS;

e. Instructing, assisting, aiding, or abetting any other person or entity in engaging in or performing any of the activities referred to in subparagraphs (a) through (d) above.

2. That Defendants be required to disseminate to potential investors corrective advertising to dispel the false and deceptive messages contained in the subject advertising;

3. That Defendants be required to recall all advertising and promotional materials containing deceptive statements as to affiliation, connection, origin, or approval of Defendants' services with HSS.

4. That Defendants be required to deliver to the Court for destruction, or show proof of destruction of, any and all advertising and promotional materials in Defendants' possession or control that contain deceptive and unlawful statements concerning HSS.

5. That Defendants be directed to file with the Court and serve on HSS, within thirty (30) days after entry of final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendants have complied with the injunction.

6. That an accounting be ordered and judgment be rendered against Defendants for all gains, profits, and advantages derived by Defendants from the above-described wrongful acts.

7. That HSS recover its actual damages.

8. That the award of profits resulting from Defendants' Lanham Act violations be trebled.

9. That HSS, on its New York statutory claims, be awarded available damages in an amount to be determined at trial.

10. That HSS be awarded interest, including pre-judgment interest, on the foregoing sums.

11. Finding this to be an "exceptional case" within the meaning of the Lanham Act and directing that Defendants pay HSS the costs of this action and HSS's reasonable attorneys' fees and expenses.

12. That HSS be awarded punitive damages to deter any future violations of HSS's rights.

13. That HSS have such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

HSS respectfully demands a jury trial on all claims and issues so triable.

DATED: February 23, 2017

Respectfully Submitted,

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